SUPREME COURT, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1471

UNITED STATES OF AMERICA and
FEDERAL COMMUNICATIONS COMMISSION,

Petitioners,

v.

NEW JERSEY STATE LOTTERY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO SUGGESTION OF MOOTNESS

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It is firmly established that a case will be considered moot only ". . . when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969). A corollary principle is that if a case has been ef-

fectively mooted as to one party but remains alive as to others, the Court will not decline to reach the merits. *Goosby* v. *Osser*, 409 U. S. 512 (1973), n. 2.

This proceeding began by the Jersey Cape Broadcasting Corporation filing a request with the Federal Communications Commission for a declaratory ruling on whether proposed news broadcasts of winning lottery numbers would violate 18 U.S.C. §1304. After the FCC ruled that news broadcasts do fall within 18 U.S.C. §1304 the New Jersey State Lottery Commission petitioned the FCC for reconsideration. The FCC denied the petition for reconsideration and the Lottery Commission then appealed to the Third Circuit Court of Appeals. By order dated November 3, 1972, the Third Circuit granted motions of the States of New Hampshire and Pennsylvania to intervene as petitioners (Pet. App. 3a, n. 2). After submission on rehearing *en banc*, the Third Circuit reversed the declaratory ruling of the FCC and held that the broadcasting of winning lottery numbers as part of regular news shows is not prohibited by 18 U.S.C. §1304. The Court then granted the FCC's petition for a writ of certiorari. Although not named by the FCC in the caption of its petition for writ of certiorari, the States of Maryland and Pennsylvania are parties before the Court by virtue of Rule 21(4) and they have filed statements in lieu of brief. Therefore, it is clear that this proceeding has been and is being pursued by several states to obtain a final declaratory ruling on whether 18 U.S.C. §1304 prohibits the broadcasting of winning lottery numbers as part of regular news shows.

In urging that the controversy as to the meaning and constitutionality of 18 U.S.C. §1304 has now been mooted, the FCC relies upon P.L. 93-583, signed by the President on January 2, 1975. This Act added a new section to the Communications Act, 18 U.S.C. §1307, which provides in pertinent part:

> "The provision of . . . [section] 1304 shall not apply to an advertisement, list of prizes, or information concerning a lottery conducted by a State acting under the authority of State law . . . (2) broadcast by a radio or television station licensed to a location in that State or an adjacent State which conducts such a lottery."

It is clear on its face that this new section does not in any way change the language of 18 U.S.C. §1304 which is the subject of this appeal. Rather, it provides that 18 U.S.C. §1304 shall be inapplicable to any broadcasting relating to legal state lotteries, if the broadcast is either from the state which conducts the lottery or an adjacent state which conducts its own lottery. In the states in which this total exemption from the operation of 18 U.S.C. §1304 is effective, the broadcasters can accept any type of broadcast from state lottery agencies including advertisements or drawings of lotteries. But since the total exemption is only applicable in states which have legal state lotteries, the question remains in every other state whether Congress intended in enacting 18 U.S.C. §1304 to prohibit the broadcasting of winning numbers in legal state lotteries on regular news shows, and if that was the intent of Congress, whether the prohibition is compatible with the First Amendment. For example, since Washington, D.C. does not have a lottery, the broadcasters located there are not within the exemption of 18 U.S.C. §1307 and their freedom to inform the public in Maryland of the results of the Maryland lottery still depends on the outcome of this case.

Since the State of New Jersey and the adjoining states of New York, Pennsylvania and Delaware have legal state lotteries, the State of New Jersey presently enjoys the full benefit of the total exemption afforded by 18

U.S.C. §1307.* However, any of these states could repeal their lottery statutes, in which event the freedom of broadcasters located in those states to inform the public of the results of the New Jersey lottery would depend on the scope and validity of 18 U.S.C. §1304. Moreover, the States of New Hampshire and Pennsylvania also are parties to this appeal, and we have been advised that some of the citizens of those states regularly hear broadcasts from states which do not conduct lotteries and thus would not fall within 18 U.S.C. §1307.

For these reasons, the question whether 18 U.S.C. §1304 prohibits the broadcasting of winning lottery numbers on regular news shows remains a live controversy between the parties and the appeal should not be dismissed as

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* The Suggestion of Mootness filed by the FCC concludes by urging that ". . . the judgment of the court of appeals should be vacated and the case remanded to that court with directions to dismiss it as moot . . . *and to give respondent an opportunity to apply to the Commission for a new declaration concerning the effect of Section 1307 on this case,* should respondent deem that necessary." There is an intimation in this statement that the FCC does not concede that Section 1307 allows the broadcasting of winning lottery numbers on regular news shows even in states such as New Jersey which conduct legal state lotteries. If there is any doubt that Section 1307 permits the broadcasting of winning lottery numbers on regular news shows, surely New Jersey is entitled to seek a final determination that Section 1304 does not prohibit such broadcasting without first being forced to go back to the FCC to seek a ruling that it falls within the exemption from Section 1304 provided by Section 1307.

moot. *Cf. Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115 (1974).

Respectfully submitted,

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NEW JERSEY STATE LOTTERY COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONSE IN OPPOSITION TO SUGGESTION OF MOOTNESS

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The State of New Hampshire, an intervenor, submits that this case has not become moot.

The petitioners base their Suggestion of Mootness on an Act (Pub. L. 93-583) amending Chapter 61 of Title 18, United States Code, by adding a new section, 18 U.S.C. 1307; that act was approved by the President on January 2, 1975. The new section provides in part that 18 U.S.C. 1304 shall not apply to any "advertisement, list of prizes, or information concerning a State acting under the authority of State law . . . broadcast by a radio or television station licensed to a location in that State *or an adjacent State which conducts such a lottery*" (emphasis added).

Vermont, which is adjacent to New Hampshire, does not conduct such a lottery. Thus, the new section may not exempt from the provisions of 18 U.S.C. 1304 whoever broadcasts by a radio or television station licensed to a location in Vermont any advertisement, list of prizes, or information concerning the New Hampshire State lottery. Without such broadcasts New Hampshire will continue to suffer injury.

For that reason, New Hampshire prays that the Court not follow the petitioners' Suggestion of Mootness and that it decide this case on the merits.

Respectfully submitted,

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February 3, 1975